

## **EXHIBIT C**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

- - - - - X  
UNITED STATES OF AMERICA, : 08-CR-288(SJ)  
: :  
: :  
-against- : United States Courthouse  
: Brooklyn, New York  
: :  
: :  
THOMAS ARCHER AND : Monday, November 23, 2009  
RUKHSANA RAFIQUE, : 10:30 a.m.  
: :  
Defendants. :  
- - - - - X

TRANSCRIPT OF CRIMINAL CAUSE FOR HEARING  
BEFORE THE HONORABLE STERLING JOHNSON, JR.  
UNITED STATES SENIOR DISTRICT JUDGE

A P P E A R A N C E S:

For the Government: BENTON J. CAMPBELL, ESQ.  
United States Attorney  
Eastern District of New York  
271 Cadman Plaza East  
Brooklyn, New York 11201  
BY: SOUMYA DAYANANDA, ESQ.  
ANDREW GOLDSMITH, ESQ.  
MARGOT BRODIE, ESQ.  
Assistant United States Attorneys

For the Defendant: ALOMAR & ASSOCIATES, P.C.  
Attorneys for the Defendant -  
Thomas Archer  
60-89 Myrtle Avenue  
2nd Floor  
Ridgewood, New York 11385  
BY: KARINA E. ALOMAR, ESQ.

Colloquy

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1 need Mr. Ba Bhatti's assistance at all on Thursday.

2 So, in a spirit of cooperation, we're willing,  
3 with the Court's permission, to let Ms. Sharma, the  
4 interpreter assigned today, go and cover the arraignment  
5 cases and come back when she's finished.

6 THE COURT: Okay.

7 MR. GOLDSMITH: Your Honor, if I wasn't clear, our  
8 understanding is the defense is calling Officer Shatzkamer.

9 MS. WHALEN: Yes.

10 MR. GOLDSMITH: We're not but we've made him  
11 available.

12 THE COURT: Okay.

13 MS. ALOMAR: Before we begin I request that Agent  
14 Silverman leave the room since he will be testifying as a  
15 witness.

16 THE COURT: Agent Silverman, would you please step  
17 outside.

18 MS. BRODIE: Your Honor for the record Margot  
19 Brodie for the Government.

20 Mr. Silverman is the case agent on this case  
21 and --

22 THE COURT: He's a witness, too. Step outside.  
23 You're still under oath.

24 MS. BRODIE: Thank you.

25 ///

M. Mills - Direct/Ms. Dayananda

6

1 **MARGUERITE MILLS**

2 recalled by the Government, having been previously duly  
3 sworn, was examined and testified as follows:

4 **DIRECT EXAMINATION**

5 **BY MS. DAYANANDA:**

6 Q Good morning, Ms. Mills.

7 A Good morning.

8 Q To clarify your testimony from this past Thursday, you  
9 testified about a conversation that you had at the end of  
10 July of this year with Mel Shatzkamer; is that right?

11 A Yes.

12 Q Now, what was your understanding of that conversation?

13 A The conversation at the end of July, Mel had come to me  
14 about a particular file that he had been asked to certify.

15 Q If you could speak in the mic. I'm sorry.

16 A I'm sorry. Better?

17 Q Yes.

18 A Mr. Shatzkamer had come to me about a particular file  
19 that he had been asked to certify. He expressed some concern  
20 about certification of files in the case. And I stressed to  
21 him that I had no problem with certification; that he had if  
22 he were asked to certify files by the U.S. Attorney's Office  
23 he needs to work through counsel to do that.

24 Q And by counsel who did you mean?

25 A His own counsel which would be for Citizenship and

M. Mills - Direct/Ms. Dayananda

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1 Immigration Servicers CIS.

2 Q Now, at that time, did you express your view as to  
3 whether these files should be released to defense counsel?

4 A No. I expressed my view to him at that time that I  
5 thought they were improperly disclosed previously. I did not  
6 express a view as to what should happen in the future.

7 Q Now, on Thursday you also testified regarding a  
8 spreadsheet that you had created that was given to  
9 Mr. Shatzkamer; is that correct?

10 A I DID, yes.

11 Q When do you believe you turned that over to  
12 Mr. Shatzkamer?

13 A I incorrectly recalled I was pressed for the date on  
14 Thursday and I believe I said it was at the end of the  
15 summer. It was actually Agent Silverman who I gave the  
16 spreadsheet to during the summer.

17 I then had an opportunity to go back and  
18 review my e-mails and I e-mailed the spreadsheet to  
19 Mr. Shatzkamer around October the 10th.

20 MS. DAYANANDA: I have nothing further, Your Honor.

21 THE COURT: Cross.

22 MS. WHALEN: Just one question.

23 CROSS-EXAMINATION

24 BY MS. WHALEN:

25 Q Did the meeting with Mr. Shatzkamer came at the end of

M. Mills - Cross/Ms. Whalen

8

1 the summer?

2 A Yes.

3 Q It's your testimony today that you didn't tell him that  
4 you had no problem with the copy of files?

5 A Just to clarify. I wouldn't characterize it as meeting  
6 with Mr. Shatzkamer. He came to pick up a file, then he went  
7 and certified it, put his own certification on it. It was  
8 more of a passing than a meeting.

9 Q Okay.

10 A And your question was did I not tell him that I had no  
11 problem with the copying?

12 Q I believe your testimony was on Thursday was that you  
13 told him that your division or your agency was had -- took no  
14 position with respect to -- or I believe had no objection to  
15 the copying and release of the files, although personally  
16 did. But you had cleared it with your Washington group, they  
17 had no objection; and my understanding from last Thursday was  
18 that you told Mr. Shatzkamer that your agency had no  
19 objection to the copying of the file?

20 A No, our agency had no objection. And upon request, if  
21 you were asked to copy it, he can work through his counsel.  
22 He was nervous about being asked to copy and certify that one  
23 particular file.

24 Q Right.

25 A And so I wanted him to be assured that he should work

M. Mills - Redirect/Ms. Dayananda

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1 with his own counsel when asked to copy files and certify  
2 them.

3 Q Okay.

4 But in that July -- at that conversation at  
5 the end of July, that was what again told him: That your  
6 agency had -- did not object to it.

7 Just to confirm your conversation with  
8 Mr. Shatzkamer at the end of July was consistent with your  
9 testimony on Thursday; that your agency had no objection to  
10 copying of the files and you advised him that he should speak  
11 to CIS legal counsel before copying the files?

12 A Yes. Our agency was no longer interested in what was  
13 going to happen with these files in the future.

14 Q Okay.

15 MS. WHALEN: No further questions.

16 THE COURT: Counsel?

17 MS. DAYANANDA: Just to clarify.

18 REDIRECT EXAMINATION

19 BY MS. DAYANANDA:

20 Q The conversation regarding the files at the end of July  
21 that you had with Mr. Shatzkamer, what file was that  
22 conversation about?

23 A He came to me specifically about I wish I could remember  
24 the name or "A" Number. But it was one particular file he  
25 was being asked to certify. It might have been it started

M. Mills - Recross/Ms. Whalen

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1 Shafique [sic] or something. I'm sorry, I don't remember.  
2 We were speaking about that particular file. He was nervous  
3 about copying that and certifying that file and I just said,  
4 "If you're asked to certify and copy files, go through your  
5 counsel."

6 MS. DAYANANDA: Thank you.

7 THE COURT: Okay.

8 MS. WHALEN: I'm sorry.

9 RECROSS-EXAMINATION

10 BY MS. WHALEN:

11 Q Just to clarify. You were only speaking about one  
12 individual file, you weren't speaking about the files that  
13 the defense had requested?

14 A In that particular conversation, that we were speaking  
15 about, I spoke to Mel twice. So, in that time period,  
16 because he picked up a file. He dropped some off, he picked  
17 them up again.

18 So, there were two conversations, but in that  
19 chain I think he was asking me about that particular file.  
20 Should he certify this? Should he do this? I insisted that  
21 I speak he speak to his own counsel. He said, "What are you  
22 all going to do about what's happened?" And I said, you  
23 know, we have no further interest in these files and what's  
24 happened with these things, it's all up to you now.

25 Q Okay. And your understanding when he said and with



M. Mills - Recross/Ms. Whalen

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1 what's happened he was referring to the files that the  
2 defense had requested?

3 A I don't know at that point if he knew that the defense  
4 had requested certain files. But he definitely knew the  
5 defense had reviewed files.

6 Q Okay.

7 And then you testified that or you're saying  
8 today that you had two conversations with Mr. Shatzkamer?

9 A Right.

10 Q So, one was with a particular file?

11 A Right.

12 Q And then one was with the list of files that the defense  
13 had requested or just the defense request in general to copy  
14 files?

15 A It wasn't about a list. I don't even know, to be  
16 honest, if Mr. Shatzkamer was aware of a specific request for  
17 more than file that he was copying at that time. But he was  
18 definitely aware at that time that I had been concerned that  
19 the defense had reviewed almost 200 files.

20 Q Okay. So, he knew about the review at that point?

21 A Yes. He definitely did.

22 Q He knew that your agency had raised concerns about the  
23 review?

24 A He did.

25 Q And that you explained to him that, based on your

E. Silverman - Direct/Mr. Goldsmith

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1 ERIC SILVERMAN,

2 called as a witness, having been previously duly

3 sworn, was examined and testified as follows:

4 THE COURT: Swear the witness in. He was sworn in  
5 before.

6 MS. DAYANANDA: He testified on Thursday.

7 THE COURT: Okay. You're still under oath.

8 THE WITNESS: Yes, Your Honor.

9 THE COURT: I'm sorry.

10 DIRECT EXAMINATION

11 BY MR. GOLDSMITH:

12 Q Agent Silverman, on November 10, 2009, did you become  
13 aware of an ordered in this case by Judge Johnson?

14 A Yes.

15 Q How did you become aware of it?

16 A I was sent an e-mail from Jason Raphael from CIS to  
17 counsel's office with the order attached to it.

18 Q Do you remember when that was?

19 A It was around 4:30 in the afternoon.

20 Q What did you understand the order to require?

21 A The order required that we copy 65 "A" Files completely  
22 and get them certified and get them over to defense counsel.

23 Q What did you do after receiving that order?

24 A I contacted my supervisor, told him about the order. He  
25 contacted his supervisor and an e-mail was generated and sent

E. Silverman - Direct/Mr. Goldsmith

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1 out to my office for people to come in on Veterans Day to  
2 photocopy "A" Files.

3 Q Was Veterans Day the following day?

4 A Veterans Day was the following day.

5 Q What was the response to that e-mail?

6 A Well, the e-mails looking for volunteers and the people  
7 were told that they would not be getting overtime and  
8 eight --

9 THE COURT: They would not?

10 THE WITNESS: Would not be get overtime.

11 A And eight agents volunteered to help me out.

12 Q So then what happened after that?

13 A Went in Veterans Day, I think was Thursday, Thursday  
14 morning at 6:00 in the morning at 26 Federal Plaza. We went  
15 through the "A" Files and divvied them up. My supervisor  
16 came in as well to help me out and I sent agents up to 26th  
17 Street where there were additional copy machines and some of  
18 us stayed on 26 Federal Plaza and we utilized every copy  
19 machine that the Office of Investigations has in their  
20 possession.

21 Q Which day the week was that Veterans Day?

22 A Veterans Day was Thursday, I believe. Am I wrong? Or  
23 Wednesday?

24 MS. WHALEN: We'll stipulate it was Wednesday.

25 THE WITNESS: Sorry.

E. Silverman - Direct/Mr. Goldsmith

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1 Q What was the status of the copying at the end of day on  
2 Wednesday?

3 A At the end of the day on Wednesday, which is I left at  
4 5:30 in the evening, we had 25 files left to copy.

5 Q What happened the following day?

6 A Came in again. Agents came in at 6:00 in the morning  
7 and continued copying the remaining 25 files. In the  
8 morning, I had sent two agents to 26 Federal Plaza with the  
9 files that had been copied as of that point to bring them  
10 down to the fourth floor of CIS so that they could start  
11 certifying while we're continuing to copy the remaining "A"  
12 Files.

13 Q You've referred to agents a couple of times are these  
14 ICE special agents?

15 A Yes. This was inclusively ICE, no other office was  
16 assisting us at all.

17 Q Okay.

18 And I believe you were saying on Thursday you  
19 had some delivered to the fourth floor in the morning?

20 A Correct.

21 Q Then what happened after that?

22 A Then we finished the copying around, I think, it was  
23 about 2:30 or 3 o'clock and we brought the remaining "A"  
24 Files to the fourth floor of 26 Federal Plaza to be certified  
25 as well.

E. Silverman - Direct/Mr. Goldsmith

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1 Q What happened after that?

2 A They stayed there and then I received an e-mail from  
3 your office from you, I believe, indicating that defense  
4 counsel does not no longer requires the files to be  
5 certified; that we can turn them over uncertified.

6 This e-mail was not until somewhere between  
7 4:30 and 5:00 and CIS fourth floor was closed at this point  
8 so we could not get the "A" Files until the next morning.

9 Q What did you do?

10 A I sent an e-mail to Ms. White telling her to stop  
11 certification immediately and that we would pick up the files  
12 first thing in the morning.

13 Q I don't think you mention Ms. White before?

14 A Ms. White is the supervisor of CIS who does the  
15 certifications for CIS on the fourth floor. And the next  
16 morning, I sent two agents again to the fourth floor to pick  
17 up the "A" Files, put them together with the ones that had  
18 already been certified because some were certified at this  
19 point and some were not.

20 That was first thing in the morning again and  
21 they brought them to CIS Chief Counsel so that they can  
22 contact defense counsel that the files were ready.

23 Q What happened after that?

24 A The files were up on the 11th floor which is where CIS  
25 Counsel was. And defense counsel, I was told, would not pick

E. Silverman - Cross/Ms. Whalen

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1 up the files, they needed them delivered. And the amount of  
2 paper involved here was not something where I could just  
3 FedEx them, so I sent two agents again to pick up the files  
4 and they delivered one set to, I believe, Ms. Whalen and the  
5 other set was picked up by a courier sent by the U.S.  
6 Attorney's Office and delivered to Mr. Archer's attorney in  
7 Queens.

8 Q Do you know approximately when the files were given to  
9 defense counsel? Copies.

10 A I think they ultimately ended up around 4 o'clock or so.  
11 I'm not sure.

12 MR. GOLDSMITH: Nothing further.

13 THE COURT: Cross.

14 CROSS-EXAMINATION

15 BY MS. WHALEN:

16 Q Agent Silverman, you were aware that the defense had  
17 requested copies of these files prior to November of 2009,  
18 isn't that correct?

19 A They were not requested from me, but I am aware that  
20 they were requested.

21 Q Okay. At some point, did you speak to Marguerite Mills  
22 about the copying of the files?

23 A About the copying of them?

24 Q Yes.

25 A After the judge ace offered?

E. Silverman - Cross/Ms. Whalen

19

1 Q No, prior to the judge's order. Some time, like, in  
2 late June or early July?

3 A I don't know if I talked about copying them. I talked  
4 to her about whether or not they should be turned over to  
5 defense counsel.

6 Q Okay. And her response was that she wanted to review  
7 the files because she had privacy concerns; is that correct?

8 A Yes.

9 Q Okay.

10 And at some point, did she get back to you and  
11 say her legal counsel no longer had privacy concerns or that  
12 her agency was no longer raising a privacy concern about the  
13 release of the files?

14 A What she had told me was that we can give the files to  
15 the U.S. Attorney's Office. I didn't talk to her  
16 specifically about the privacy because I don't really know  
17 that stuff.

18 Q Okay.

19 When did she tell you it was okay to give the  
20 files to the U.S. Attorney's Office?

21 A I don't remember.

22 Q Was it in November of 2009 or prior?

23 A No, it was prior to that.

24 Q Would you guess the end the summer or later? Would you  
25 estimate, not guess.

M. Shatzkamer - Direct/Ms. Whalen

24

1 were permitted to review certain immigration files in  
2 relation to a case against the Law Offices of Thomas Archer.

3 Were you aware that defense counsel had  
4 reviewed files at that time?

5 A I'm sorry, could you please repeat the question?

6 Q Sure.

7 In February of 2009, the defense counsel  
8 reviewed certain immigration files and that their review of  
9 those files was in connection with the prosecution of Thomas  
10 Archer and Rukhsana Rafique.

11 Were you aware that defense counsel had  
12 reviewed the files in February of 2009?

13 A I'm not certain about the date, but I was aware that  
14 defense counsel reviewed files.

15 Q Okay.

16 And after that review, the Government agreed  
17 to provide copies of certain files to defense counsel.

18 Were you aware of that?

19 A That I wasn't aware of.

20 Q Okay.

21 At some point, did you learn in June of, say,  
22 2009 that defense counsel wanted copies of those files?

23 A No. Just there were files, witness files. There was  
24 one witness file, that was the only file that I was aware of  
25 that was going to be provided to defense counsel.



M. Shatzkamer - Direct/Ms. Whalen

25

1 Q Okay.

2 At some point, were you asked to deliver all  
3 of the files involved in this case to Marguerite Mills?

4 A I don't think so.

5 Q Okay.

6 At some point, did you learn that Ms. Mills  
7 had all the files and was reviewing them for privacy  
8 concerns?

9 A I don't know if they were being reviewed for privacy  
10 concerns, but I found out that all the files were within  
11 Ms. Mills's department.

12 Q Okay.

13 At the end of July, did you have a  
14 conversation with Ms. Mills regarding the copying and  
15 certification of files?

16 A Only of one witness file.

17 Q Okay.

18 Did you have any conversations with Ms. Mills  
19 concerning the defense counsel review of all of the other  
20 files?

21 A I might have, I'm not certain. I can't recall.

22 Q Do you recall at any time Ms. Mills telling you that it  
23 was okay to copy files but you should speak to your legal  
24 counsel before copying them?

25 A I might have. I don't recall that.

M. Shatzkamer - Direct/Ms. Whalen

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1 Q Okay.

2 At what point did you become aware of that you  
3 were to copy 66 files for the defense?

4 A I read an e-mail on November 3rd that was sent to me  
5 November 2nd. And that basically outlined that I would -- I  
6 was asked to copy and certify 48 or 49 files.

7 Q Okay. I'm going to show you what's been marked  
8 as -- what I am marking as Defendant's Exhibit B.

9 (Defendant's Exhibit E was marked for  
10 identification.)

11 (Approaching the witness.)

12 (Handing to the witness.)

13 Q I'm showing you what's been mark as Defendant's Exhibit  
14 B. Take a minute to look at it.

15 A Mm-hmm.

16 THE COURT: D as in dog?

17 MS. WHALEN: B as in boy, Your Honor. I'm sorry.

18 THE WITNESS: Yes.

19 Q That is an e-mail chain between -- beginning, I believe,  
20 with Ms. Dayananda to you; is that correct?

21 A Yes, it is.

22 Q And she's alerting you -- first of all, do you recognize  
23 this document?

24 A Yes, I do.

25 Q Okay. And is it a copy of e-mails that were sent

M. Shatzkamer - Direct/Ms. Whalen

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1 A No, we did not.

2 Q Okay.

3 Did you speak to anyone in your legal counsel  
4 about making those files?

5 A No. Not at that point in time.

6 Q Okay.

7 So, on October 20th, you informed  
8 Ms. Dayananda, in response to her e-mail, that you were not  
9 going to be making copies of anything in the files except  
10 those applications that were prepared by Mr. Archer, isn't  
11 that correct?

12 A That's correct.

13 Q And you were informed, however, that you needed to make  
14 complete copies of the files, isn't that correct?

15 A No, it's not.

16 Q Prior on October 15th, weren't you told that you needed  
17 to make complete copies?

18 A No, I was not.

19 Q Okay. I'm just going to -- okay.

20 Just calling your attention to the e-mail  
21 string that's second on this list from you to Ms. Dayananda  
22 on October 20th.

23 MS. WHALEN: Your Honor, I'm just standing next to  
24 the witness because I don't have a separate copy.

25 THE COURT: All right.

M. Shatzkamer - Direct/Ms. Whalen

29

1 THE WITNESS: I'm sorry, yes.

2 Q Okay.

3 And she told you that she wanted the complete  
4 files?

5 A Yes.

6 Q And your proposal was you were only going to make copies  
7 of the files, copies of the files, that were applications for  
8 Mr. Archer, isn't that correct?

9 A That's correct.

10 Q But at that point that was your decision, isn't that  
11 correct?

12 A I had -- well, I had based it on a conversation I had.

13 Q With whom?

14 A With Ms. Mills.

15 Q When?

16 A On October 15th.

17 Q Isn't it true that Ms. Mills told you that her division  
18 had no objection to the files being copied but you should  
19 speak to counsel at CIS?

20 A I don't recall that, but my conversation with Ms. Mills  
21 basically advised me that if we supplied all the copies of  
22 the file, we'd be in violation of the Privacy Act and the  
23 Rules of Confidentiality.

24 Q On October 15th, did you advise Ms. Dayananda of that?

25 A Yes. I can't recall if it was on October the 15th, but

M. Shatzkamer - Direct/Ms. Whalen

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1 shortly afterwards we advised Ms. Dayananda.

2 Q When you say, "we," who do you mean?

3 A I meant myself and my two associates because we had an  
4 ongoing project with the U.S. Attorney's Office and we were  
5 going over there any way and, you know, we would discuss it.

6 Q Are you the individual at CIS who makes determination  
7 about privacy concerns?

8 A No, I'm not.

9 Q Who makes those determinations?

10 A It's CIS Counsel.

11 Q And as of the time period from October 15th to  
12 October 20th, you hadn't discussed this issue with CIS  
13 Counsel had you?

14 A No, I did not.

15 Q October 20th to November 4th, did you discuss 24 issue  
16 with CIS Counsel?

17 A Yes, I did.

18 Q When did you discuss with CIS Counsel?

19 A I believe on November the 3rd or November the 2nd, I  
20 can't recall.

21 Do you have -- is there an e-mail to that  
22 effect?

23 Q Let me see if I can find something for you.

24 A Thank you.

25 MS. WHALEN: I believe the parties are going to

M. Shatzkamer - Cross/Ms. Dayananda

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1 MS. DAYANANDA: Your Honor, if I could move this  
2 into evidence at this time.

3 MS. WHALEN: No objection.

4 THE COURT: Received.

5 (Government's Exhibit MS-1 was received in evidence  
6 as of this date.)

7 Q It starts on the first page, Mr. Shatzkamer, on the  
8 bottom. You just referred to that as of an e-mail from  
9 yourself to Ms. Mills that's dated October 15th and time  
10 stamped 8:39 a.m. is that right?

11 A Yes, it is.

12 Q In this particular e-mail, you referred to a  
13 conversation that you and your associate had with myself  
14 regarding the defense counsel for 48 files; is that right?

15 A That is correct.

16 Q Now, in this e-mail, you say you advised myself that,  
17 "Under no circumstances would the original "A" Files be  
18 delivered to them," meaning, defense counsel; is that  
19 correct?

20 A That's correct.

21 Q Now, when you --

22 When you relayed that to me, whose decision  
23 was that, "Under no circumstances should they be given to  
24 defense counsel."

25 A That was the wording that I used.

M. Shatzkamer - Cross/Ms. Dayananda

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1 Q Based upon whose decision was that?

2 A Well, I had -- I was under suspicion that a breach had  
3 taken place with files that may have been sent to the defense  
4 with no guardianship of the files from anyone from our agency  
5 or the U.S. Attorney's Office.

6 Q And when you learned of that, did you have a  
7 conversation with Ms. Mills regarding this breach on this  
8 day?

9 Let's just talk about October 15th.

10 A I believe so.

11 Q What was the substance of that conversation?

12 A That the files may -- the integrity of the files may  
13 have been compromised because the files were unattended by  
14 anyone from our agency, ICE, or the U.S. Attorney's Office.

15 Q What was her response regarding giving these files to  
16 the defense counsel?

17 A I can't recall.

18 Q On October 15th?

19 A Well, on October 15th, our conversation entailed making  
20 copies of these files. And, basically, Marguerite explained  
21 the Privacy Act to me and the Rules of Confidentiality and  
22 that we would be in violation of those if we turned over  
23 I-30s, I-485s, if there were, in fact, any Violence Against  
24 Women's Act Petitions, Religious Worker Petitions former SAW  
25 applications, former legalization applications, and first and

M. Shatzkamer - Cross/Ms. Dayananda

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1 foremost asylum applications.

2 Q It was your understanding as of October 15th that the  
3 "A" Files in their entirety should not be given to the  
4 defense?

5 A Yes, that's correct.

6 Q And was that based upon the conversation that you had  
7 with Ms. Mills?

8 A Yes.

9 Q Now, I'm going to show you what's been entered into  
10 evidence as Defendant's Exhibit B.

11 MS. WHALEN: Yes.

12 Q Showing you what's been entered into evidence as  
13 Defendant's Exhibit B.

14 Is that an e-mail from October 20th?

15 A Yes, it is.

16 Q Who is that e-mail between?

17 A That's from yourself to myself. And then, actually,  
18 it's from you starting with the bottom, it's from you to me.  
19 Then, I responded to you and then you responded back to me.

20 Q Just looking at the middle portion of this e-mail on  
21 Page 1, Mr. Shatzkamer, when you are replying to an e-mail  
22 from the Government, you list, starting with Line 3 you say,  
23 "As far as a list of what the defense will not be given."

24 A That's correct.

25 Q Then you list the applications that you just -- you



M. Shatzkamer - Cross/Ms. Dayananda

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1 mentioned earlier.

2 A Yes.

3 Q Now, when you relayed this information, what  
4 conversation are you basing this decision on?

5 A Based on the conversation I had on October the 15th with  
6 Ms. Mills.

7 Q Showing you what's been marked for identification as  
8 MS-3.

9 (Government's Exhibit MS-3 was marked for  
10 identification.)

11 MS. DAYANANDA: Your Honor, you should have a copy  
12 of it.

13 THE COURT: MS-3? I have MS-1.

14 MS. DAYANANDA: It might be the whole packet there.  
15 I can give you another copy.

16 THE COURT: Go ahead. Question.

17 (Approaching the witness.)

18 (Showing the witness.)

19 Q Showing you what's been marked for identification as  
20 MS-3.

21 MS. DAYANANDA: Here you go, Your Honor. This has  
22 been previously entered into evidence as MM-4 just so the  
23 record is clear.

24 Q Do you recognize what's been handed to you?

25 A Yes.

M. Shatzkamer - Cross/Ms. Dayananda

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1 Q What is that?

2 A This was an e-mail from Mr. Goldsmith to myself  
3 basically advising me that it would be okay to turn over, to  
4 make copies of the entire "A" File with the exception of  
5 officers' notes and security checks.

6 Q And what was the date of that e-mail?

7 A That was November the 2nd.

8 Q And what was your reaction when you received this  
9 e-mail?

10 A Well, I wasn't at work on November 2nd, I read it on  
11 November 3rd. And to me, this presented a complete reversal  
12 of my conversation with Ms. Mills on October the 15th.

13 Q As a result of reading that e-mail on November 3rd, what  
14 did you do?

15 A Well, at that point, I advised my supervisors that there  
16 was a reversal of what would be copied and what would not.  
17 And we all agreed that, at this time, we should go upstairs  
18 and speak with our CIS Counsel.

19 Q Who were the CIS Counsel?

20 A It was Mr. Jason Raphael.

21 Q Did you have a conversation with Mr. Raphael?

22 A Yes, I did.

23 Q And based on that conversation --

24 What was Mr. Raphael's reaction to the e-mail?

25 A Well, I felt that Mr. Raphael did not want us to turn

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1 over any of the -- anything other than the CSS (Newman) the  
2 765 applications.

3 However, he showed me a section in the law  
4 books, statute, that we could turn over at that point  
5 previous SAW applications and previous legalization  
6 applications, because that was the only applications where  
7 they were listed in statute that we could turn those over for  
8 law enforcement purposes.

9 As far as I knew, at that point, and as far as  
10 our conversation, we weren't going to turn over or make  
11 copies of any of the other files at that point based on my  
12 conversation with Mr. Raphael.

13 Q Now, I think you mentioned 765 applications. You mean  
14 687?

15 A I'm sorry, 687s.

16 Q Okay.

17 Now, from that conversation with Mr. Raphael,  
18 is it fair to say that it was still your understanding that  
19 the "A" File in its entirety could not be turned over?

20 A That's correct.

21 Q Now, during that period, did one of you suggest to have  
22 a phone conference with the U.S. Attorney's Office?

23 A Yes. Mr. Raphael suggested that we have a  
24 teleconference because we were going later that day to the  
25 U.S. Attorney's Office and he requested that the U.S.

M. Shatzkamer - Cross/Ms. Dayananda

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1 Attorneys be present and their supervisor for a conference  
2 particularly about this matter.

3 Q Now, on November 4th, were you present for that phone  
4 conference?

5 A Yes.

6 Q What was the result of that phone conversation?

7 A I don't believe anything had changed at that point.  
8 From my understanding, in listening to it, we were going to  
9 make copies but only copies of the 687s which there were  
10 copies of already; and, at this time, we were going to  
11 include the previous SAW applications and the previous  
12 legalization applications.

13 Q When you say nothing had changed, it's still from based  
14 upon that phone conference, the "A" File would still not be  
15 given; isn't that correct?

16 A That's correct.

17 Q Who was present for that phone confidential?

18 A Myself, you, and Mr. Goldsmith, and the two associates  
19 from my office.

20 Q Who were they?

21 A They were Danica Prince-Jones and Terry Shaw.

22 Q

23 MS. DAYANANDA: Your Honor, if I approach the  
24 witness.

25 THE COURT: You may.

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1 (Approaching the witness.)

2 (Handing to counsel.)

3 (Handing to the witness.)

4 BY MS. DAYANANDA:

5 Q Who was the phone conversation with, Mr. Shatzkamer?

6 A The phone conversation was with Mr. Raphael and yourself  
7 and Mr. Goldsmith.

8 Q And who does Mr. Raphael work with?

9 A He's our CIS Counsel.

10 Q Showing you what's been marked as MS-4?

11 (Government's Exhibit MS-4 was marked for  
12 identification.)

13 Q Do you recognize that, Mr. Shatzkamer?

14 A Yes, I do.

15 Q And what is that that's been handed to you?

16 A This is a directive to Ms. White to make three copies of  
17 "A" Files listed in the judge's order.

18 Q Let me -- sorry to interrupt you.

19 Why don't you start at the bottom.

20 A Okay.

21 Q Is that an e-mail --

22 A It's an e-mail from Mr. Raphael to myself and to the ICE  
23 agent.

24 Q What's the date of this e-mail?

25 A And it's dated November 10th.

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1 MS. DAYANANDA: Your Honor if I could enter MS-4  
2 into evidence.

3 MS. WHALEN: No objection.

4 THE COURT: Received.

5 (Government's Exhibit MS-4 was received in evidence  
6 as of this date.)

7 Q Starting there the time stamp of 3:33. In substance, is  
8 that informing you of Judge Johnson's order?

9 A Yes.

10 Q Now, you said that e-mail was addressed to you; correct?

11 A It was addressed to myself and to the ICE agent.

12 Q Now, what was your reaction when you read this e-mail?

13 A It, basically, I took this to mean that if you have the  
14 "A" Files listed in the order, deliver them to Ms. White and  
15 Ms. White will make copies and certify each of the copies.  
16 But I didn't have the "A" Files.

17 Q Who is Ms. White?

18 A Ms. White is the supervisor of our Information Data  
19 Entry Records Section.

20 Q Is she in the same unit as you?

21 A No, she's in a different unit.

22 Q Now --

23 A She works for CIS, though.

24 Q What's Ms. White's unit do?

25 A They keep records, they create "A" Files. They ship

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1 "A" Files out, they receive them. They consolidate them.  
2 They create "A" entries in our data systems.

3 MS. DAYANANDA: Your Honor, may I approach.

4 THE COURT: You may.

5 (Approaching the witness.)

6 (Handing to the witness.)

7 (Government's Exhibit MS-5 was marked for  
8 identification.)

9 Q Showing you what's been marked as MS-5.

10 Do you recognize that e-mail?

11 A Yes.

12 Q Is that an e-mail from November 10th where you're one of  
13 the recipients on it?

14 THE COURT: Just a second. What is MS-5?

15 THE WITNESS: Your Honor, MS-5 is a series of  
16 e-mails. The bottom is an e-mail with -- advising of your  
17 order. Then there's an e-mail from Mr. Raphael to Ms. White  
18 and cc'ing myself, the ICE agent, Mr. Peter Gregory, I don't  
19 know who that is, and the AUSA. And then there's a response  
20 from Ms. White to all concerned and then a thank you from  
21 Mr. Raphael to Ms. White.

22 MS. DAYANANDA: Your Honor, may I enter MS-5 into  
23 evidence.

24 THE COURT: You may.

25 (Government's Exhibit MS-5 was received in evidence

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1 as of this date.)

2 BY MS. DAYANANDA:

3 Q Now, based upon your reading of MS-5, did you have any  
4 more involvement in the copying of these files or turning  
5 them over to the defense?

6 A No, I did not.

7 Q And could you, in your capacity, Mr. Shatzkamer,  
8 independently release files to defense counsel or to the  
9 U.S. Attorney's Office?

10 A Well, I could release files to the U.S. Attorney's  
11 Office, but not to defense counsel.

12 Q What are the steps you have to go through before you  
13 release files to defense counsel?

14 A Well, it wouldn't be me releasing them, it wouldn't be  
15 my agency releasing them. We have to go through our  
16 big brother-big sister agency, ICE.

17 Q And the big brother and the big sister agency, ICE, and  
18 who else?

19 A And the U.S. Attorney's Office.

20 MS. DAYANANDA: I have nothing further.

21 MS. WHALEN: Just briefly, Your Honor.

22 REDIRECT EXAMINATION

23 BY MS. WHALEN:

24 Q Mr. Shatzkamer, your testimony is that your discussion  
25 on October 15th with Ms. Mills is when Ms. Mills told you not



M. Shatzkamer - Redirect/Ms. Whalen

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1 to release copies of the files to defense counsel; is that  
2 correct?

3 A That's correct.

4 Q And it's your position that she never told you to review  
5 that decision with your counsel at CIS; is that correct?

6 A I can't recall.

7 Q But you can recall that she told you on October 15th not  
8 to provide copies of the files for defense counsel?

9 A Yes, because I had gone over it with her. I had said to  
10 her, let me make sure I completely understand and we went  
11 through it at least two or three times. We even joked about  
12 violating the Privacy Act could land someone in jail and pay  
13 a hefty fine and I even stated that I don't have much longer  
14 to go as an officer and that's not the way I want to go out.

15 Q So, this conversation is crystal clear in your mind?

16 A Well it's as clear as I can remember.

17 Q Okay.

18 But with respect to her telling you not to  
19 turn the files over to defense counsel?

20 A I just can't recall.

21 Q She told you not to turn copies of the files over to  
22 defense counsel, isn't that correct?

23 A She said that if we did, we would be in violation of the  
24 Privacy Act and the Rules of Confidentiality.

25 Q What you can't recall is whether she then told you to

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1 speak to your counsel?

2 A That's correct.

3 Counselor, I just want to say that at a later  
4 point in time, I can't recall when, but I remember the ICE  
5 agent telling me that Ms. Mills had suggested that I speak to  
6 my counsel. But I can't recall hearing that from Ms. Mills.

7 Q Okay. But the next you hear is on November 2nd where  
8 Ms. Mills says it's okay to provide copies?

9 A That's correct.

10 Q But on November 2nd, you still don't provide copies?

11 A That's correct.

12 Q Now --

13 A Actually, it was November 3rd. I'm sorry.

14 Q You were out that day, okay.

15 The final authority, you testified, I think a  
16 moment ago, that you would have the authority to provide  
17 copies to the U.S. Attorney of the files. Isn't that  
18 correct?

19 A I could.

20 Q Okay.

21 So despite your conversation on October 15th  
22 with Ms. Mills, you still could have copied the files and you  
23 still could have provided them to the U.S. Attorney's Office.  
24 Isn't that correct?

25 A Minus what I couldn't include. But we had copies of

## Colloquy

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1                   So, that while the copying was completed on  
2 Thursday, there was still certifying to be done. Once the  
3 certifying was complete and actually then called off, then  
4 the files could have were turned over to counsel.

5                   But, it's our position that DHS did comply  
6 with the order immediately as soon as practically possible  
7 considering the order came, I believe, at 3:30 in the  
8 afternoon, a Tuesday, Wednesday was the federal holiday, and  
9 they were turned over on Friday.

10                  THE COURT: But there was a telephone call to  
11 Homeland Security for the files and they told defense  
12 counsel, come get them.

13                  MS. DAYANANDA: That's correct, a phone call was  
14 made by Ms. Whalen on the morning of Friday the 13th. At  
15 that point, I believe she spoke with Mr. Raphael who  
16 indicated he was just about to call her regarding the  
17 "A" Files and then we, the U.S. Attorney's Office, and  
18 Agent Silverman then provide you had the files to counsel.

19                  MS. WHALEN: Your Honor, I'll let Ms. Alomar talk  
20 more about Mr. Gupta.

21                  But with respect to Mr. Gupta, just briefly.  
22 He is unavailable now because the Government never served him  
23 with a trial subpoena.

24                  Had -- I mean, all of these issues aside it's  
25 not the defense's job to preserve government evidence. The

## Colloquy

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1 Government wants to call this witness, he is a witness that  
2 is helpful to the Government. The Government -- the trial  
3 date at least November 9th was set on June 22nd. I think it  
4 was adjourned a week some time after then I. But as of June  
5 22nd, the Government knew there was a November trial date.  
6 They never served Mr. Gupta with a subpoena. They never  
7 brought him in on a material witness.

8 THE COURT: Were they obligated to serve him with a  
9 subpoena?

10 MS. WHALEN: If they wanted to call as a witness,  
11 Your Honor, yes, I think they are obliged to serve him with a  
12 subpoena at a minimum and not just simply say he tells he's  
13 going to be unavailable.

14 My understanding is that the first step is,  
15 when somebody says they're not coming in voluntarily, you  
16 give them compulsory process. Then --

17 THE COURT: I understand that he said that he was  
18 going to come in.

19 MS. WHALEN: My understanding was he said he wasn't  
20 going to come in, he was leaving. We then had the deposition  
21 on August 11th, again, he was not served with a subpoena.  
22 I'm saying, at a minimum, once the Government knew he was  
23 reluctant, they had a duty to at least serve him with a  
24 subpoena.

25 I agree that a material witness order is a

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1 serious step, but the Government could have gotten a material  
2 witness order and then just consented to his release on a  
3 significant bond; and this is important turns out this viewed  
4 owned two pieces property in New York; he had two Co-op  
5 apartments. We didn't learn that until at the time of the  
6 deposition, but that was meaningful property that could have  
7 secured his stay in the United States for another two months.

8           This wasn't a hardship case, he was working,  
9 he had a place to stay. He had turned over very minimal bond  
10 for immigration, and the Government didn't even -- the  
11 Government could have come to court on a material witness  
12 order, consented to his release if he simply turned over his  
13 passport.

14           So, what I'm saying is that the ordinary  
15 things that the defense would be required to do to secure a  
16 witness's attendance at court were not complied with. And to  
17 now claim these unavailable because he's in India I think is  
18 unavailing.

19           I agree, after the testimony, that given the  
20 way the DHS system works, I don't know if Ms. Alomar will  
21 agree with me, but it looks to me like the agent didn't have  
22 many options at that point. But, the fact is that they had  
23 plenty of options before that point and none of them were  
24 taken to even minimally, minimally to the point of just  
25 giving the guy a subpoena, were taken to try to secure his

1 presence here.

2 And given that he had substantial assets --

3 THE COURT: I remember asking one of the witnesses  
4 when he was about to board the plane if they had gotten to  
5 him while he was on the plane what were the options of the  
6 agents and they said they had none.

7 MS. WHALEN: And I accepted that as true. Maybe  
8 Agent Silverman doesn't have arrest authority. But had they  
9 served him with a subpoena, they could now be moving for  
10 contempt proceedings and his assets could be at issue and you  
11 might be able to compel him to come back for those reasons.  
12 But because no subpoena was given, there's basically nothing  
13 anyone can do. And, again, I disagree with the Government  
14 the defense is not required to preserve the Government's  
15 evidence.

16 THE COURT: Okay.

17 MS. WHALEN: With respect to the files.

18 Your Honor, I think the problem here is that  
19 the there were two court orders. The Government agreed to  
20 turn these files over to the defense counsel June 22nd. You  
21 incorporated that agreement as part of your discovery order.

22 We heard from the witnesses, everybody was  
23 pushing things off on everyone else. But as of October 15th,  
24 the Government demanded those files from Mr. Shatzkamer, the  
25 copies. Mr. Shatzkamer and Ms. Mills have a very different

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1 February 2009, the fact that we were able to take notes about  
2 these files in February 2009, does not help us in terms of  
3 cross-examination, preparation for a trial that's going to  
4 start on November 16th.

5 THE COURT: But, for the record, you now have those  
6 files?

7 MS. WHALEN: For the record, we now have those  
8 files and the court has granted an adjournment for us to  
9 review those files.

10 MS. ALOMAR: Actually, Your Honor I'm still missing  
11 three files. I notified the Government last week that after  
12 reviewing the files, that I was missing six. The Government  
13 came last Thursday and provided me with three and they  
14 advised that they would still be forwarding the three more; I  
15 still have not received them.

16 MR. GOLDSMITH: Your Honor, if I can?

17 We mentioned that issue to the Court on  
18 Thursday. Ms. Alomar did give us a list of six files, three  
19 of them we had, the Government had, and we gave copies that  
20 day to both defense counsel. The other three the Government  
21 did not have.

22 The case agent located two of the remaining  
23 files, made copies of them. I believe those have been  
24 FedExed and I believe are to be delivered today to both  
25 defense counsel. The final file, the sixth file, that

## Colloquy

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1 Ms. Alomar asked for concerns an individual who was arrested  
2 relatively recently in some other part of the country.

3 As the ordinary policy with these "A" Files  
4 goes, when that person was arrested, the "A" File was shipped  
5 to him. That order, that "A" File has been requested back  
6 here. As soon as it gets back here, we will make copies and  
7 provide it to defense counsel.

8 Certainly, the agents as Agent Silverman  
9 testified, worked quite hard Veterans Day and the following  
10 day to make the copies. They missed that one, or I should  
11 say they missed these six, fully accidentally, plainly. As  
12 soon as we were notified about it, about it we did what we  
13 could to get them to them.

14 THE COURT: Okay.

15 MS. ALOMAR: Your Honor -- are you finished?

16 MS. WHALEN: Yes.

17 MS. ALOMAR: With regards to Mr. Gupta, I would  
18 like to add that the Government had many options available to  
19 them to secure Mr. Gupta's attendance.

20 The first one which was the securing of his  
21 passport. Agent Silverman testified that the U.S. Attorney's  
22 Office was, in fact, in touch with the trial attorneys with  
23 immigration. And they could have made a request to the  
24 court, the immigration court, at that time that as a  
25 condition of his bond, that Mr. Gupta turn over his passport



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1 something that the Government never did.

2           The Government had many options thereafter  
3 because, after the June 22nd court date where the court  
4 allowed the deposition of Mr. Gupta, the Government was aware  
5 that it was not necessarily permitting the introduction of  
6 that deposition. So, they had all of the opportunities at  
7 that time to --

8           THE COURT: Let me ask you this. Mr. Gupta, at  
9 that time, the only charge against him was an illegal alien;  
10 is that correct?

11           MS. ALOMAR: There was the illegal alien and then  
12 thereafter Your Honor there were -- the Government agreed not  
13 to prosecute him for his criminal acts here in the  
14 United States.

15           THE COURT: So, the only thing pending was his  
16 removal from the country.

17           MS. ALOMAR: That is correct. And he was hoping to  
18 secure voluntary departure because he had a pending I-140  
19 application which is a labor certificate. So, that labor  
20 certificate if he received voluntary departure he could  
21 receive the benefit of that labor certification and reenter  
22 and seek a waiver to reenter the country.

23           And it's our position that, at that time, that  
24 the Government had every single opportunity to secure his  
25 passport or to put a higher bond, do a subpoena, things that

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1 they never did.

2 In addition, Your Honor, the Government has  
3 provided us with no evidence whatsoever as to what they have  
4 done in order to secure his appearance back into the  
5 United States.

6 THE COURT: The me ask the Government.

7 Is there a possibility of getting him back?

8 MR. GOLDSMITH: Your Honor, we don't know where he  
9 is. The afternoon of the 13th, he told the agent that he  
10 would meet him the following morning and then he got on a  
11 plane and left.

12 THE COURT: Okay.

13 MS. ALOMAR: Your Honor, it's or position that the  
14 defense has not been permitted to properly cross-examine this  
15 witness because -- and that his appearance at trial.

16 THE COURT: But at the deposition you  
17 cross-examined him.

18 MS. ALOMAR: We did, Your Honor.

19 But here, during the hearings today, one of  
20 the witnesses provided us with a screen printout of  
21 Mr. Gupta's immigration file, something that the defense  
22 didn't have until last week. And during that court date, it  
23 showed that Mr. Gupta had sent in an application from a  
24 particular attorney, information that we didn't have at the  
25 deposition.

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1 THE COURT: But this hearing was not a discovery  
2 proceeding, this hearing was for a specific purpose.

3 MS. ALOMAR: Yes, Your Honor.

4 But had we had that, had we had that  
5 information at the time of Mr. Gupta's deposition, we would  
6 have been able to cross-examine him on those issues and we  
7 were deprived of that opportunity because we did not receive  
8 that documentation.

9 And now for Mr. Gupta's deposition to be  
10 permitted, then we're deprived of that opportunity to  
11 cross-examine him because he's not here. And now that we  
12 have the material, there's no witness to ask the questions  
13 to.

14 It was the Government's obligation to, at the  
15 very minimum, subpoena Mr. Gupta. The Government said, you  
16 know, in reality set the mechanisms they did very little to,  
17 you know, ensure that Mr. Gupta came to court. Actually, in  
18 my opinion, they did nothing. They had the opportunity as of  
19 June to subpoena him and they did not.

20 THE COURT: So, you say an act of omission made him  
21 unavailable?

22 MS. ALOMAR: Yes, Your Honor.

23 THE COURT: You have cases on that?

24 MS. ALOMAR: *United States v. Mann. United States*  
25 *v. Olivares* which is a case here, it was in the Southern

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1 District and was decided, I believe, in 2007 where the court  
2 specifically denied the Government's introduction of the  
3 testimony of a witness because the Court felt that the  
4 Government set the mechanism in place to prevent this  
5 witness --

6 THE COURT: But I'm saying omission.

7 MS. ALOMAR: Right. In that --

8 THE COURT: You're saying that the Government in  
9 this case set the mechanism for Mr. Gupta's departure?

10 MS. ALOMAR: Yes, Your Honor. They could have  
11 served him with a subpoena. They could have requested that  
12 he surrender his passport. They could have increased his  
13 bond. They could have done a number of things that they did  
14 not do.

15 THE COURT: That's a little different than that  
16 Southern District case where they said in the Southern  
17 District that there was acts of commission.

18 MS. ALOMAR: Well in, that case, it involved  
19 essentially the individual could have been detained because  
20 of his plea of guilty on a sentencing case.

21 But in that case, too, the Court also found  
22 that the Government had certain means to secure this  
23 witness's attendance and that the Government didn't use those  
24 means. And, as a result, they denied the Government's  
25 request to introduce their witness's deposition at trial.

## Colloquy

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1 MR. GOLDSMITH: Your Honor, if I could respond on  
2 the Gupta issues and Ms. Dayananda will respond on "A" File  
3 issues.

4 First, the cases that Ms. Alomar mentioned,  
5 both of those involve acts of commission by the Government.  
6 In the *Mann* case in the First Circuit, the Government  
7 actually gave the witness a plane ticket to use to leave the  
8 country. That is far from what happened here.

9 In the Olivares case, in the Southern  
10 District, the Government consented to that witness's release  
11 on bail in violation of a statute that specifically required  
12 that he be detained. Again, there is nothing like that in  
13 this case.

14 The Government did preserve its evidence in  
15 this case by moving for and taking the deposition of  
16 Mr. Gupta. He said all along that he wanted to leave but  
17 that he would return for trial. On that basis, I'm not  
18 actually sure that we could have gotten, we or the defense,  
19 could have gotten a material witness warrant from the Court  
20 because the witness said that he would be here.

21 The defense raises the issues of giving him a  
22 trial subpoena which, frankly, we think would have done  
23 little, if anything, to change what took place. They  
24 mentioned taking his passport. He's an Indian citizen, Your  
25 Honor, even if we had taken his passport, he still could have